IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG
(REPUBLIC OF SOUTH AFRICA)

CASE NO: A619/2009
DPP REF: JAP2006/0269
DATE :15 MARCH 2010

In the matter between:

KUNENE, RICHARD	Appellant
And	
THE STATE	Respondent

JUDGMENT

WILLIS J:

1. The appellant appeals against his convictions and sentence on a count of robbery with aggravating circumstances, kidnapping, murder and unlawful possession of arms and ammunition. He received an effective sentence of life imprisonment.

2. I have had the benefit of reading Halgryn AJ's judgment in this matter. I regret that I am unable to agree with him. I wish, however, to commend him for his thorough analysis of the evidence as well as the law.

3. To my mind the following facts are relevant:

3.1. The deceased's nephew, Motusi Petlele, gave evidence that five men, of whom the appellant was one, intruded upon the deceased's home on 12th May 2003;

3.2. Motusi Petlele had the opportunity to observe the appellant for about 20 to 30 minutes;

3.3. Members of the group threatened to kill the deceased;

3.4. The deceased's hands and feet were tied up with hanger wire by the intruders;

3.5. Members of the group took the deceased away in his motor vehicle;

3.6. The appellant was not seen at the home of the deceased after he had been taken away in the motor vehicle;

3.7. The deceased's corpse was found two days later in a state of decomposition;

3.8. The *postmortem* report shows that the deceased was found with his hands and feet tied with wire;

3.9. The cause of the deceased's death was "bullet wounds of brain, lung and spine";

3.10. Near the corpse of the deceased were found spent cartridges which a ballistics expert determined had been fired from a firearm found at the home of the appellant in the possession of the appellant's brother on or about 29th May 2003;

3.11. A cellular telephone which belong to the deceased and had been taken from him in the robbery was also found in the home of the appellant in the possession of the appellant's brother;

3.12. The appellant was arrested on 12th June, 2006;

3.13. Motusi Petlele identified the appellant at an identification parade held on 14th July 20006.

4. Although the question of so-called hearsay evidence by Inspector Jones, who found the cellular telephone and the firearm at the home of the appellant, absorbed some of the attention of De Jager AJ, the trial judge and Halgryn AJ, it seems to me that all that really occurred was that Inspector Jones was giving an explanation for how it came about that he went to the home of the appellant and conducted a search. Ultimately, how it came about that he went to the appellant's home is irrelevant to the determination of the issues. What is relevant (and is certainly not hearsay) is that he found the cellular telephone and the

firearm at the appellant's home in the possession of the appellant's brother.

5. Mr *Madondo*, counsel for the appellant, who also had the advantage of appearing for him in the trial, accepted that the honesty of Motusi Petlele identification of the appellant was not in issue. What is in issue is the reliability of that identification. Halgryn AJ also seems to accept that this is the position. I ask myself, "What are the chances that Motusi Petlele would mistakenly and at random point out a person in whose home and in the possession of his brother it just so happens were found the firearm from which the bullets which killed the deceased were fired as well as the cellular telephone which belonged to the deceased?" In my opinion, there is no reasonable possibility that this could be so. Moreover, while I accept that the fact that the deceased was found with his hands and feet tied with wire as described by Petlele, does not corroborate Petlele's identification, it does corroborate the reliability of his powers of observation. If the evidence is viewed in its totality, there can be no reasonable doubt that, in the words of Leon J in *S v Ganie*,[1] the evidence of the single witness was more than adequately corroborated to justify the conviction. The "totality approach" of Nugent J, as he then was, in *S v Van der Meyden*[2] where he emphasises the importance of looking at the totality of the evidence, very much commends itself in a case such as this. That judgment of Nugent J has received the unanimous approval of five judges in the Supreme Court of Appeal. (See *S v Van Aswegen*[3].) (See also *R*

[1] 1967 (4) SA 203 (N) at 206H
[2] 1999 (2) SA 79 (W); 1999 (1) SACR 447 (W)
[3] 2001 (2) SACR 97 (HHA) at 101a-f

v Hlongwane[4]; *S v Hlapezula & Others*;[5] *S v Khumalo & Others*[6].)

6. In my opinion, there can be no serious criticism of Petlele for failing to mention in his statement to the police that he had previously seen the appellant with the deceased in a group of people at a braai or that he failed to be more specific about the role of the appellant.

7. When the evidence is viewed in its totality, it is clear that the appellant was part of a group poof people who intended to kill the deceased and did so. At very least, the appellant is guilty of the crimes as an accomplice on the basis of the doctrine of common purpose. In the case *R v Jackelson*[7] the following is said by Juta JA "All persons who knowingly aid and assist in the commission of a crime are punishable just as if they had committed it."[8] Later he says "but if a person assists in or facilitates the commission, if he stands by ready to assist although he does no physical act as where a man stands outside a house while his fellow-burglar breaks into the house (per Coleridge CJ in *R v Coney* 8 QBD at 569,570), if he gives counsel or encouragement, or if he affords the means for facilitating the commission, if in short there is any co-operation between him and the criminal, then he 'aids' the latter to commit the crime".[9] This was approved in *S v Williams en 'n Ander*[10] and

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[4] 1959 (3) SA 337 (A) at 340H-341B
[5] 1965 (4) SA 439 (A) at 442F
[6] 1991 (4) SA 310 (A) at 327H-I
[7] 1920 AD 486
[8] At 490
[9] At 491
[10] 1980 (1) SA 60 (A) at 63 C-E

in *S v Khoza*.[11] In the *Williams* case Joubert JA, giving the judgement of the court said at 63 B " 'n Medepligtige vereenselwig hom bewustelik met die pleging van die misdaad deur die dader of mededaders deurdat hy bewustelik behulpsaam is by die pleging van die misdaad of deurdat hy bewustelik die dader of mededaders die geleentheid, die middele of die inligting verskaf wat die pleging van die misdaad bevorder."[12] Joubert JA goes on to say at "Die medpligtige se bewustelike hulpverlening by die pleging van die misdaad kan uit 'n doen of late bestaan. Laasgenoemde is bv die geval waar 'n nagwag versuim om alarm te maak omdat hy hom bewustelik met die pleging van 'n inbraak by die gebou wat hy moet oppas, vereenselwig"[13]. In the *Khoza* case (supra), Corbett JA, as he then was, approved these observations of Joubert JA although he lamented the fact that there would not appear to be any word in English which conveniently conveyed the concept of "medepligtigheid".[14] Although Corbett JA's judgement in the *Khoza* case was the minority judgement, in the case of *S v Sefatsa and Others*[15], Botha JA records at 900B that although he had a difference of opinion with Corbett JA in the *Khoza*_ case on the liability of an accused ' joining in ' in an assault upon a person who has already been fatally wounded, he was generally in agreement with his views on common purpose.

8. In the *Sefatsa* case (supra), five judges unanimously approved the following views expressed by the learned authors Burchell and Hunt: "Association in an illegal common purpose constitutes

[11] 1982 (3) SA 1019 (A) at 1033E
[12] At 63B
[13] At 63E
[14] At 1031C- 1032A
[15] 1988 (1) SA 868 (A)

the participation the *actus reus*. It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all" and "Moreover, it is not necessary to show that there was a causal link between the conduct of each party to the common purpose and the unlawful consequence."[16]A common purpose may be manifested simply by conduct.[17]

9. Insofar as the State's failure to call another witness at the house of the deceased is concerned, in my opinion, the situation is fundamentally distinguishable from that in *S v Teixeira.*[18] In the first place counsel for the appellant was counsel in the trail and confirmed that he had been given that witnesses statement. Secondly, and perhaps more importantly, since the Constitutional Court decision in *Shabalala and Others v Attorney- General, Transvaal and Another*[19] the State is required to make the contents of the police docket available to an accused person's legal representative prior to the trial. This court is well aware that this practice of making the police docket available to an accused person's legal representative has prevailed in this division for many years.

10. In regard to the possession of the firearm and ammunition, I asked Mr *Madondo* the following: "If a group of people intrude upon a person's home with the clear intention of killing him, at

[16] See, at 899B-G
[17] See *S v Sefatsa* (supra); *S v Mgedezi and Others* 1989 (1) SA 687 (A); S v Motaung and Others 1990 (4) SA 485 (A); S v Khumalo en Andere 1991 (4) SA 310 (A) and *S v Singo* 1993 (2) SA 765 (A) at 772D.
[18] 1980 (3) SA 755 at 764A
[19] 1996 (1) SA 725 (CC)

least one of them possesses a firearm, the deceased is in fact killed with a firearm and that firearm is found at the home of the appellant, is it reasonably possible to infer that the appellant had no intention to possess the firearm at least on a collective basis?" Mr *Madondo* could give no answer to this question.

11. I am satisfied that the appellant was correctly convicted.

12. There was no misdirection in regard to the sentences on counts 1, 2, 4 and 5: 10, 6, 5 and 3 years' imprisonment respectively. These sentences, in all the circumstances, cause me no disquiet whatsoever, In any event, they will automatically run concurrently with he sentence of life imprisonment on count 3 (the murder count). In respect of this count, not only did the appellant fail to show any substantial and compelling circumstances justifying a lesser sentence than life imprisonment but if one takes into account his age at the time (39 years' old), the overall circumstances of the crime and his string of relevant previous convictions involving attempted murder, robbery, assault, theft and unlawful possession of arms and ammunition, I can see no basis upon which this court can interfere. I should mention that I can see no logic in the proposition that time spent awaiting trial can be a relevant consideration where life imprisonment otherwise seems to be the appropriate sentence.

13. The appellant's appeal against conviction and sentence on all counts is dismissed.

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N.P. WILLIS

Judge of the High Court of South Africa

I agree with the order of Willis J

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D.S.S. MOSHIDI

Judge of the High Court of South Africa

HALGRYN AJ:

Introduction

14. In the late afternoon of the 12th of May 2003, at around 19:00 to 20:00, yet another law abiding citizen of our land fell victim to the hands of criminals, who saw fit to violently and forcibly kidnap one Tshepang Petlele, ("the deceased"), attorney at law, from his home, passionlessly stick him into the boot of his car with his hands and feet tied together with hanger wire, ultimately shoot him in his head, lung and spine and as for good measure, poured some flammable liquid over his entire body, set him alight and left his mutilated and charred body in the Schoeman Cemetry, next to the Kathlehong Road.

15. This heinous crime was investigated and led the State to prosecute certain individuals, including the Appellant herein, successfully, in the Court *a quo*, where De Jager AJ found the Appellant guilty on several counts, including kidnapping and murder and sentencing the Appellant to an effective life long imprisonment.

16. Dissatisfied with the convictions and sentences, the Appellant sought leave to appeal from the Court *a quo*, who granted the application, both against the convictions and sentences. It is this appeal which serves before us.[20]

17. In respect of the appeal against the convictions, the main issue which we were called upon to adjudicate herein, in my view, involves the question of the identification of the Appellant by a single witness.[21]

The Charges, Summary of Substantial Facts and formal Admissions

[20] During the long and repeated deliberations I had with my learned, and much more senior Brothers Willis J and Moshidi J herein, prior and subsequent to the actual appeal hearing, it transpired that we did not share the same views and unfortunately, I found myself in the difficult position, as a young first time acting Judge, of holding the minority view. I was requested by the most Senior Judge, my Brother Willis J, to write the Judgment in this matter even before our respective differences became apparent. I was again requested to write my Judgment by my Brother Willis J, after our respective differences became crystallized and I set about doing so, with as much care and circumspection as I could muster, well aware of the fact that this will be the minority Judgment. I do regret that I found myself unable to agree with my learned Brothers on the outcome herein. I do wish to extend to them my sincere appreciation for the kind manner in which they dealt with my disagreements, patiently debating the many issues with me at length and more specifically for my Bother Willis J ultimately encouraging me to stand my ground and reminding me that after all, that is why our Law allows for appeals. My respect for them is ongoing.

[21] If I am wrong about the question of identification, interesting questions of Law arises involving the association with a common purpose and involvement as an accomplice. By reason of the view I adopt herein, I need not deal therewith.

18. The charges levelled at the Appellant were as follows:-

1. ***"ROBBERY WITH AGGRAVATING CIRCUMSTANCES AS DEFINED IN SECTION 1 OF ACT 51 OF 1977, READ WITH SECTION 51 OF ACT 105 OF 1997***

In that upon or about 12 May 2003 and at or near 27 Dereham Street, Mulbarton, the accused unlawfully and intentionally assault Tshepang Petlele and did then and there with force and violence, take his motor vehicle to wit a Toyota Cressida, registration number LRH802GP, television set, hi-fi music system, clothes[22] *and three cell phones, his property in his lawful possession and did thereby rob him of the same, aggravating circumstances as defined in Section 1 of Act 51 of 1977 being present.*

2. KIDNAPPING

In that on or about and at or near the place mentioned in count 1, the accused unlawfully and intentionally deprived Tshepang Petlele of his liberty by restraining and detaining him and removing him from House Number 27 Dereham Street, Mulbarton to an unknown place where he was further detained for some time.

3. MURDER READ WITH SECTION 51 OF ACT 105 OF 1977

In that during or about the period 12 to 14 May 2003 and at or near Katlehong in the district of Germiston, the accused did unlawfully and intentionally kill Tshepang Petlele, a male person.

4. CONTRAVENTION OF SECTION 3 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 READ WITH SCHEDULE 4 OF ACT 60 OF 2000 – UNLAWFUL POSSESSION OF A FIREARM

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[22] This count was amended during the trial to bring it in line with the evidence.

In that upon or about and/or near the places mentioned in counts 1 and 3, alternatively upon or about 28 May 2003 at or near 529 Nucla Section Katlehong, the accused did unlawfully had in his possession a firearm, the make and calibre of which is unknown to the State, without holding a license, permit or authorisation issued in terms of the Act to possess the said firearm.

5. CONTRAVENTION OF SECTION 90 READ WITH SECTIONS 1, 103, 117, 120(1)(a) AND 121 READ WITH SCHEDULE 4 OF ACT 60 OF 2000 – UNLAWFUL POSSESSION OF AMMUNITION

In that on or about the date and at or near a place mentioned in counts 1 and 3 alternatively on or about 28 May 2003 at or near 592 Ncula Section Katlehong the accused unlawfully had in their possession ammunition, the number and calibre of which is unknown to the State, without being the holders of:

A license in respect of a firearm capable of discharging that ammunition;

A permit to possess ammunition;

A dealers license, manufacturers license, gunman's license, import, export or a transit permit or transporters permit issued in terms of this Act; or

Without being authorised to do so."

19. The "***SUMMARY OF SUBSTANTIAL FACTS***" reads as follows:-

1. *"On 12 May 2003, the accused robbed the deceased of his motor vehicle and other household items in Deraham Street, Mulbarton.*

2. *The accused also kidnapped the deceased and took him to the Katlehong area.*

3. *The deceased's corpse was found burnt at Katlehong cemetery on 14 May 2003. There were empty bullet shells around his body.*

4. *The deceased died of the bullet wounds of brain, lungs and spine.*

5. *The State alleges that at all material times the accused and his companion(s) acted in furtherance of a common purpose to commit the offences wherefore they are herewith indicted. At this stage it is not known precisely when or where the common purpose was formed or who all the parties thereto were, but it is alleged that it was in existence, at the least immediately prior to, and for the duration of the commission of the said crimes."*

20. A list of admissions in terms of Section 220 of Act 51 of 1977[23] was agreed to and marked Exhibit A. It reads as follows:-

"1. That the deceased person is Tshepang Petlele.

2. That the deceased died on 14 May 2003 as a result of a bullet wound of the brain, lung and spine which he sustained at Schoeman Cemetery along the B91 Road, Katlehong, in the district of Alberton.

3. That the deceased sustained no further injuries from the time of death on 14 May 2003 until a post mortem examination was conducted.

4. That Dr Jan George Pieterse conducted a post mortem examination on the body of the deceased on 15 May 2003, the serial number as reflected at 1022/2003 and the doctor recorded his findings on Exhibit B5.

5. The correctness of the facts and findings of the post mortem examination as recorded in

[23] The Criminal Procedure Act.

Exhibit B by Dr Jan George Pieterse is accepted as being correct.

6. *That Exhibit C is the photo album taken by Inspector Chris Wessels.*

7. *Exhibit C contains a key of the photo plan and is a key of the points accepted as correct.*

8. *Exhibit C further indicates that five (5) spent cartridges were collected at the scene, sealed with official seal number 1712, marked Germiston PKIS421/05/03 and were handled at the Pretoria Forensic Science Laboratory.*

9. *The photo album in Exhibit C was photographed at Schoeman Cemetery along the P91 road, Katlehong, in the district of Alberton.*

10. *That Exhibit D is a ballistics report as compiled by Sergeant P S Mojela in terms of Section 212(4)(a) and 212(8)(a) of Act 51 of 1977 and its entire content is accepted as correct."*

8. During the course of the trial in the court *a quo* further admissions were agreed to and recorded in a document marked Exhibit A1. It reads as follows:

"1. That Inspector Chris Wessels found five empty cartridges at Schoeman Graveyard on the 14 May 2003 near the deceased body.

2. *That the abovementioned cartridges were sealed and sent to forensic laboratory in Pretoria by Inspector Geldenhuys with official seal number 1712.*

3. *That Exhibit "D" is the ballistics report as compiled by Sergeant B S Mojela in terms of Section 212(4)(a) and to 212 (8)(a) of Act 51*

of 1977 and its entire content is accepted as correct.

4. *That Exhibit "H" is the ballistic report as compiled by Inspect P H Steyl in terms of Section 212(4)(a) of Act 51 of 1977 and its entire content is accepted as correct.*

5. *The ID parade procedure is admitted as correct the only dispute is that the accused alleges that the investigating officer, Captain Dlamini was present during the ID parade."*

The evidence

9. The evidence, which was lead in the Court *a quo* is comprehensively recorded in the Judgment by De Jager AJ. It is, for present purposes, not necessary to summarize all of the evidence in as much detail herein. It was and it remains the Appellant's defence that he did not commit the offences he was charged with and that on the day in question, he was nowhere near the deceased's house.

10. The veracity of this defence depends on whether the State proved beyond a reasonable doubt that the Appellant had been reliably identified as the guilty person.

11. To this end, the State relied, *inter alia*, but largely, on the evidence of a single witness, one Motusi Petlele ("Petlele"), 19 years old at the time he gave his evidence and 14 years old when he witnessed the incident, forming the subject matter of this appeal.

12. Petlele's evidence went along the following lines:-

12.1. On the 12th of May 2003, he was at the deceased's house where he resided at the time.

12.2. The deceased, a practising attorney, was his uncle.

12.3. One Thulisile,[24] his uncle's then girlfriend, was also in the house, feeding the child that she had born from her relationship with the deceased.

12.4. At some stage, Thulisile unlocked the kitchen door and later, three men entered the house.

12.5. Two of the three men went straight into the deceased's bedroom and the third took Petlele to the deceased's bedroom whilst pointing a firearm at him.

12.6. In the deceased's bedroom, Petlele found the deceased lying on the floor with his hands and feet tied with hanger wire.

12.7. Petlele's hands were also tied up with hanger wire and he was made to sit down.

12.8. After he was made to sit down, a fourth man entered the deceased's bedroom with Thulisile and her child. She was made to sit on the bed.

[24] She was referred to by this name and as "Thuli" during the trial. Her real name is Thulisile Motaung. She was no 2 on the State's list of witnesses, but not called as witness, although she was an eyewitness to the crimes, according to Petlele. This is not in dispute. I refer to her herein further as "Thulisile".

12.9. The men accused the deceased of representing an accused in a rape case involving a girl who was the child of one of these men.

12.10. A fifth man then entered the deceased's bedroom and the men started a search for the deceased's firearm.

12.11. Unable to find the firearm, the men turned their attention to the deceased who was asked where the firearm was.

12.12. Frustrated at the deceased's reply that the firearm was at the Bethani Police Station, they started kicking him in his stomach and ribs as he laid helpless on the floor, still tied up with hanger wire.

12.13. When asked about the firearm, Petlele also told the men that the firearm was at the police station, prompting the men to threaten to kill him, as they accused him of lying.

12.14. After several unsuccessful attempts at starting the deceased's Toyota Cressida, the men finally dragged the deceased to the vehicle, put him into the boot thereof and drove off.[25]

12.15. Thulisile told Petlele to wait for 15 minutes and then phoned her mother, who in turn "summoned" the police.

12.16. Petlele also stated that he saw two of the five men (not the Appellant and his co-accused, in the court *a quo*) earlier on that day, in what he referred to as a 20/20 Golf and travelling with

[25] Although Petlele could not testify to this, as he did not witness this.

them was Thulisile who, according to him, "…*was trying to hide from the child".*[26]

12.17. The two men in the 20/20 Golf were part of the group of five men who came and took his uncle away.

12.18. About a year and one month later, on the 14th of July 2006, he attended an identification parade at which he identified the Appellant as one of the five men who took his uncle away on the 12th of May 2003.

12.19. Petlele had in fact seen the Appellant before. This was at a braai at the deceased's house, prior to the incident under consideration, when the deceased was not present; but Thulisile was.

12.20. On the day of the braai, the sun was shining and Petlele had about six hours to observe the Appellant.

12.21. On the day of the incident, some time after the braai, Petlele had about 20 to 30 minutes to observe the Appellant whilst there was a light on in the house.

12.22. During cross-examination, it was put to Petlele that in his statement, which he made to the police the very next day after the incident, he did not mention at all that he had observed the Appellant at a braai on an earlier occasion.

[26] I do not quite understand this. It appears as if he states that she was trying not be noticed.

12.23. Petlele replied to this that he, at the time of making his statement, responded only to what he was asked, and these questions were restricted to what happened during the incident.

12.24. Mr Mquhulu, representing the State at the trial in the Court *a quo,*, was quick to point out that in another statement which Petlele made to the police after the identification parade, (a year and one month later), he did mention this fact.

12.25. Petlele was criticised for not informing the police, when he made his first statement, of the fact that he "knew" the Appellant.

12.26. Petlele could not remember how the Appellant was dressed on the day of the braai or on the date of the incident and could not mention any identification features, but baldly states that he does remember him.

13. How it came about that the Appellant and his co-accused, in the court a quo,[27] were arrested and charged, was, by way of summary, as follows.

14. Inspector Heinrich Reinhard Jones ("Jones"), at the time of his evidence, an Inspector in the employ of the South African Police Service, at Worcester Detective Branch, testified that with the assistance of printouts from MTN, he established that the number of a cell phone which was stolen during the robbery under consideration was still being used. He phoned the person in possession of the telephone and under the guise that this

[27] Herein after "accused no 2".

person had won a competition, met him at the Tsokosa Police Station. This person was Christopher Mhlope, ("Mhlope"), who had since passed away.

15. Jones produced a statement by Mhlope but it was ruled inadmissible after an objection, by the Court *a quo*.[28]

16. The actual ruling which the Court *a quo* made is somewhat curious. The Court ruled:

> *"How they arrived at the premises would be irrelevant, what is relevant is in fact what they saw. For this reason I rule that the hearsay evidence would not be admitted in the present circumstances. That does not mean that this is any final order. If in the event it is found that it will be relevant the court will revisit its ruling."*[29]

17. In the Court *a quo's* final Judgment, the following was recorded:

> *"…the court ruled that the probative value of the statement was in the court's view of little importance and did not warrant the breaking of the rule on hearsay evidence."*[30]

18. Although I am left in some doubt as to the full effect of the Court *a quo's* Order in this regard, I accept, for the purposes of my Judgment that the effect was that the hearsay evidence of Mlhope has been ruled inadmissible in terms of a final Order, against which lies no counter-appeal.

[28] A copy of Mhlope's statement appears at p267-269.
[29] At page 77 of the transcript.
[30] At p 206.

19. This is significant, as I propose not to take into account at all, the contents of Mhlope's statement and any references to hearsay evidence of what Mhlope may have told Jones. This view I take herein, may well be the determining factor herein.

20. Although I do not express any definitive view on the subject, I am somewhat surprised, with respect, at the exclusion of this hearsay evidence. I would have thought it highly relevant and admissible in terms of section 3 of Act 45 of 1988 as, on the face of it, it appears that it could have constituted extremely significant circumstantial evidence, which may have provided sufficient corroboration, to accept Petlele's evidence.

21. I reiterate that I will not have any regard to that evidence which has been ruled inadmissible.[31] It is however so, that what transpired as a result of the inadmissible hearsay evidence, at No 592 Ncala Section Katlehong, on an unknown date,[32] was indeed admissible and relevant in the Court *a quo* and also for the purposes of this appeal.

22. This is what happened as a result of the inadmissible hearsay evidence. Jones attended the premises with the assistance of other officers, which turned out to be the place where the Appellant lived, with others. Jones knocked on the door but nobody answered. The officers who assisted him were at the back of the house. The door was a wooden door with a little piece of glass in the middle and he was able to look through this

[31] This, admittedly, is not easy and one has to consciously guard against allowing any niggling feeling of suspicion to take hold.
[32] The Court *a quo,* incorrectly found that this was on the 12th of may 2003, at p204, line 22.

door window. He noticed a person getting onto a cupboard and hiding something. He did not know what it was at that stage. He kept on knocking and after a while accused no 2, opened the door. His name is Sipho Kunene, brother of the Appellant.

23. Jones enquired about the Appellant's whereabouts and accused no 2 informed Jones that his brother was not at home.

24. Jones asked permission to search the house and with the permission of accused number 2, Jones went straight to the place where he saw the person hiding something. There he found a Norinco pistol.

25. Jones also found the identity book of the Appellant in that house. It became common cause that the Appellant lived there, with others.

26. Jones arrested accused number 2 for unlawful possession of an unlicensed firearm and ammunition.

27. The Appellant was also thereafter arrested, the exact facts and circumstances surrounding his arrest, not being material herein.

The legal position relating to a defence of an alibi

28. *In casu,* the Appellant denies having ever been in the house of the accused and more specifically on the day of the incident under consideration.

29. Although the Appellant understandably[33] did not rely on a specific alibi, his defence is one of not being there and should be treated the same way as a defence of an alibi. If an accused genuinely cannot remember where he was on a specific day when he is alleged to have committed a crime, then this must not, even subconsciously be held against him. This is potentially difficult for an accused, as opposed to a version that he was elsewhere, the veracity of which can be objectively tested.

> *"An alibi is a defence that the accused was somewhere else at the time the crime was committed, and it thus calls into question the state's evidence concerning the offender's identity.* ***Today it is accepted that an alibi is not a kind of special defence which has to be proved by the defence. The State must prove that the accused committed the crime and it must therefore disprove the alibi****; and the alibi does not create an issue that has to be judged separately: "The correct approach is to consider the alibi in the light of the totality of the evidence in the case, and the Court's impression of the witnesses."*[34] (The emphasis is added.)

30. It is in my view, not inappropriate or stating the obvious, (regard being had to the peculiar facts of this case), to approach this matter ever mindful of the strength of the presumption of innocence in our Law,[35] to bear in mind that there is no burden of proof on an accused to prove his alibi[36] and not to loose sight of the requirement that the State bears the burden of proving each of the essential elements of the offence and that there is no onus on the Appellant to disprove

[33] It would have been quite incredible for him to remember where he was on a date so far in the past.
[34] THE LAW OF EVIDENCE; C W H Schmidt and H Rademeyer, Issue 5, August 2007, Lexis Nexis, Durban, at p4-25. See also Thebus v S 2002 3 All SA 781 (SCA) 795.
[35] See S v Zuma and Others 1995 (2) 642 (CC).
[36] See S v Mhlongo 1991 2 SACR 207 (A) 210d.

any of them and that the standard of proof is beyond reasonable doubt.[37]

31. It would not suffice to find that the alibi of the Appellant, (or otherwise put, the Appellant's defence of not being at the deceased's house at the time of the incident), is improbable; it has to be found to be false, beyond reasonable doubt.[38]

Evidence of identification to be approached with caution

32. The disputed identification *in casu* was that of a single witness. The well known cautionary rule relating to the evidence of single witnesses thus finds application, the legal position in respect of which I deal with hereunder.

33. Moreover, our Law requires that evidence of the identity of an offender, generally, be treated with caution.

> *But, as our courts have emphasized again and again, in matters of identification, honesty and sincerity and subjective assurance are simply not good enough. There must in addition be certainty beyond reasonable doubt that the identification is reliable, and it is generally recognised in this regard that evidence of identification based on recollection of a person's appearance can be dangerously unreliable and must be approached with caution."*[39]
>
> "*An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble*

[37] See Osman and Another v Attorney-General, Transvaal 1998 (4) SA 1224 (CC), at 1229 G-H.
[38] See PRINCIPLES OF EVIDENCE, 2nd Edition, Schwikkard Van Der Merwe, Juta, 2002, at p517.
[39] See S v Charzen and Another 2006 (2) SACR 143 (SCA) at 148. See also S v Ngicina 2007 (1) SACR 19 (SCA); at para [16], p24.

each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough."[40]

"When evidence of identity is that of a single witness, there is of course all the more reason for caution-the cautionary rule which applies to single witnesses must then be taken into account ***as well****."*[41] (The emphasis is added.)

"Experience has shown that it is for various reasons very easy for the identifying witness to be mistaken."[42]

34. In S v Mthetwa[43] it was said:

"Because of the fallibility of human observation, evidence of identification is approached with some caution. ***It is not enough for the identifying witness to be honest; the reliability of his observation must also be tested.*** *This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witnesses; the opportunity for observation both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility, the accused's face, voice, built, gait and rest; the result of identification parades, if any; and, of course the evidence by or on behalf of the accused. The list is not exhaustive, these factors, or such of them as are applicable in a particular case, are not individually decisive and must be weighed one against the other, in the light of the totality of the evidence, and the probabilities …"* (The emphasis is added.)

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[40] See Sv Shekelele 1953 (1) SA 636 (T) at 638F-G, per Dowling J.
[41] See R v T 1958 (2) SA 676 (A).
[42] See PRINCIPLES OF EVIDENCE, supra, at 515.
[43] 1972 (3) SA 766 (A) at 768.

35. Williamson JA stated:

> "*The often patent honesty, sincerity and conviction of an identifying witness remain, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence.*"[44]

The cautionary rule relating to the evidence of a single witness

36. The history, development of and the current legal position relating to the evidence of a single witness in criminal matters is authoritatively set out in the work by Schmidt and Rademeyer.[45]

37. This history of the rule is not repeated herein, save to state that the rule has developed from *testis unus, testis nullus*[46]*,* to where it is today.

38. The learned authors state the following:-

> *"Briefly, then, the position is that a finding can be based on the evidence of a single witness; But such evidence is always treated with caution,* ***and in a criminal matter a conviction will normally follow only if the evidence is substantially satisfactory in every material respect or if there is corroboration.*** *The corroboration need not necessarily link the accused to the crime. Failure to attempt to rebut the evidence of a single witness could be a supporting factor. The evidence can be satisfactory even if it is open to a degree of criticism. The fact that a single witness occupies an official position, such as that of a police officer or a traffic inspector, does not add weight to*

[44] S v Mehlape 1963 (2) SA 29 (A). See also THE SOUTH AFRICAN LAW OF EVIDENCE, Zeffert, Paizes, Skeen, Lexis Nexis, Butterworths, Durban, at p142-146.
[45] THE LAW OF EVIDENCE; supra, at 4-8 to 4-10. See also THE SOUTH AFRICAN LAW OF EVIDENCE, supra at p799-801. See also PRINCIPLES OF EVIDENCE, supra, at p390.
[46] So strongly was it felt that a single witness's evidence was unreliable, that a conviction based thereupon only, could not follow.

his evidence. The need for a cautious approach is increased by the factors set out by De Villiers JP in the first Mokoena case. It can be increased by other factors such as failure to adduce available real evidence (eg. a packet of dagga). Clearly a court must consider all the particular facts of the case in order to determine whether the single witness is credible. It is important to realise that the court ought not to become ensnared in formalism:

> *"In other words, the exercise in caution must not be allowed to displace the exercise of common sense."*

At the end of the day it is the standard of truth which is decisive."[47] (The emphasis is added.)

39. Leon J stated the following:-

> *"A court should approach the evidence of a single witness with caution and* ***should not easy convict upon such evidence unless it is substantially satisfactory in all material respects or unless it is corroborated."***[48] (The emphasis is added.)

40. Mere lip service to the above cautionary rules will not suffice.

> *"But a mere pronouncement that it is taking a cautious approach to the evidence is insufficient and is the equivalent of non-compliance. It must be apparent that the court has indeed treated the evidence cautiously: "What is necessary is that the judicial officer, who is the trier of fact, should demonstrate by his treatment of the evidence…that he has in fact heeded the warning.""*[49]

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[47] THE LAW OF EVIDENCE, *supra,* at 4-9.

[48] State v Ganie 1967 (4) SA 203 (N) 206 H. See also: S v Letsedi 1963 (2) SA 471 (A) 473 F, S v R 1977 (1) SA 9 (T), S v Hlonga 1991 (1) SACR 583 (A), S v Jones 2004 SACR 420 (C) 427, Stephens v S [2005] 1 ALL SA 1 (SCA) para 17.

[49] See THE LAW OF EVIDENCE, supra, at 4-6 to 4-7. The quote is from Sv Avon Bottle Store (Pty) Ltd 1963 (2) Sa 389 (A) at 393-394, per Botha JA.

41. During the deliberations with my learned Brothers herein, Willis J and Moshidi J, I was reminded of the approach adopted by Nugent J, as he then was, in S v Van der Meyden.[50]

42. In the Van der Meyden decision, Nugent J held that it would be quite wrong to separate the evidence in a criminal matter into compartments and to examine the state and defence cases in isolation. He stated as follows:-

> *"A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence."*[51]

43. Nugent J also found as follows:

> *"The onus of proof in a criminal case is discharged by the state if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. (See, for example, R v Difford 1937 AD 370 especially at 373, 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so, only if there is at the same time no reasonable possibility that innocent explanation which has been put forward, might be true. The two are inseparable, each being the logical corollary of the other.*
>
> *In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at*

[50] 1999 (2) SA 79 (WLD).
[51] S v Van der Meyden *supra* at 82A – B

> *the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."*[52]

44. The approach by Nugent J must be read with the following dictum in Moshepi and Others v R (1980-1984) LAC 57 at 59 F-H, which was approved by Marais JA[53]:

> *"That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."*

45. The approach by Nugent J, (as read with the approach by Marais JA), with respect, is undoubtedly correct, but it does not impact on our cautionary rules. If anything, I feel that this holistic approach allows for and compliments the legal position, as far as cautionary rules are concerned.

46. I propose to follow the aforesaid approach herein and will endeavour to do so by examining the evidence by the single witness herein, Petlele, and attempt to establish first of all whether his evidence meets the standard of being "*substantially satisfactory in every material respect*".

47. If I am satisfied that the evidence by the single witness does not meet this standard, I will then endeavour to establish whether there is corroboration of the single witness' evidence

[52] S v Van der Meyden *supra* at 80G – J and 81A – B
[53] In S v Hadebe and Others 1998 (1) SACR 422 (SCA), at p426 e-h.

and more specifically with the emphasis on being whether there is corroboration of the identification of the Appellant.

Analysis of the single witness's evidence

48. Petlele was 14 years old at the time of the incident and 19 years old at the time of him testifying in the Court *a quo*. I am of the view that his youth should also be taken into account in adopting a cautious approach herein and the fact that a substantial period of time had lapsed since the incident and his evidence.

49. A very noticeable and, for me, indeed a very troublesome aspect of Petlele's evidence, lies in the fact that whilst he appeared to be very meticulous in his recall on many aspects, he failed to make any mention at all, (not even in the slightest), of what the role of the Appellant was, during the incident. In point of fact, not a word was said in this respect during the entire trial in the Court *a quo.*

50. Moreover, Petlele failed to point out what the roles of the two men were during the incident, whom he had seen earlier on, on the date of the incident, in the 20/20 Golf.

51. To illustrate: Patlele testified that Thulisile went to the kitchen and unlocked the door and that later:

> *"…**three***[54] *men came in"* of whom *"**Two** of them went straight into Tshepang's bedroom"*[55] and *"**The third one** came into the study room. **This third one** came and took*

[54] The emphasis herein further is added.
[55] Tshepang is the deceased. This evidence appears at p15 of the record.

> *me out of the study room, took me into the deceased's bedroom whilst pointing a firearm at me. After I had been taken from the study room into the deceased's bedroom, on arrival there I found that the deceased was lying on the floor with his hands and legs tied with hanger wire. When I came into that bedroom I was tied up, my hands were tied up with hanger wires."*[56]

52. Petlele then went on to testify that after he was made to sit down in the deceased's bedroom:

> *"… **Then there came a fourth one** now. He came with Thulisile from the dining room and Thulisile came with the child as well. They then came into the deceased's bedroom. After they came into the bedroom Thulisile was made to sit on the bed. After having come in, **one of the males** then said deceased had represented an accused person, who was one of those male's children in the rape case …"* [57]

53. After one of the four men, (who had at that stage entered the bedroom), made the statement that their apparent gripe with the deceased was that he had represented an accused person who had raped one of the men's' daughter, Petlele was then specific to say:

> *"Thereafter there came **a fifth one**."*[58]

54. To summarize: Petlele had meticulously taken care to testify that:

54.1. initially **three men** came in through the kitchen door,

[56] At p15.
[57] At p16.
[58] At p16.

54.2. of whom **two** went straight to the deceased's bedroom;

54.3. and **the third one** came to him, where he was in the study, pointing a firearm at him and took him to the deceased's bedroom, where he found the deceased tied up with hanger wire, by what must have been **the two men** who went straight to the deceased's bedroom;

54.4. **a fourth man** then entered the bedroom with Thulisile and her child and they came from the dining room;

54.5. after the **fourth man** entered the bedroom, **one of the men** informed them of their complaint, i.e. that the deceased had represented a rapist of one of their daughters,

54.6. where after **a fifth man** entered,

54.7. and only after **all five men** were present in the deceased's bedroom, they started looking for the deceased's firearm.

55. Petlele testified that:

> *"**they** asked the deceased where the firearm was."*[59]

[59] At p17.

56. After the deceased had told the men that the firearm was at the Bethanie Police Station:

> *"… **they** then accused him of lying and they started kicking him."*[60]

57. The men then turned to Petlele who confirmed that the deceased's firearm was indeed at the Police Station where after:

> *"**they** then threatened to kill me, because they accused me of lying."*[61]

58. Petlele continued to testify as follows:-

> *"Thereafter **they** pulled the deceased next to a door that was next to the passage. **They** then asked the deceased as to how his Cressida motor vehicle can be started. He tried to explain to them as to how they can start it. Thereafter **two of these men** went out. **They** could not get his motor vehicle started and they came back into the house. The deceased then explained to me as to how this car can be started, because **these men** said they would be going with Thuli to the car and she is the one who is going to start it for them. **Two of these men** took Thuli out of the house and then Thuli came back into the house with **those two men** after having failed to start the car. Thereafter **they** pulled Tshepang in that passage, took him out to the vehicle …*
>
> *Well, what **they** said is **they** were going to kill him and then **they** got out with him."*[62]

59. Bearing in mind that the identification of the Appellant was of the utmost importance herein, I find it very discomforting that Petlele was unable to spontaneously tell the Court *a quo* what

[60] At p17.
[61] At p18.
[62] At p18 and 19.

the Appellant's role was during the incident, to some extent at the very least.

60. I would have thought it fairly obvious that an identifying witness under similar circumstances would have, at the very least, to some extent told the Court *a quo,* in what manner the Appellant partook in the mischief.

61. This is not asking too much in my view, e.g.-

61.1. was the Appellant one of the initial three men;

61.2. was the Appellant one of the two men who went directly to the deceased's bedroom or the one who came to Petlele in the study and who took him at gun point to the deceased's bedroom;

61.3. was the Appellant the one who tied Petlele's hands with hanger wire and made him to sit down in the deceased's bedroom;

61.4. was the Appellant the fourth man who entered the room with Thulisile;

61.5. was the Appellant the one who informed them of their complaint, i.e. that the deceased had represented the rapist of one of their children;

61.6. was the Appellant perhaps the fifth man who entered the bedroom;

61.7. was the Appellant one of the men who kicked the deceased;

61.8. was the Appellant one of the men who threatened to kill Petlele, after he confirmed that the deceased firearm was at the police station;

61.9. was the Appellant one of the men who started dragging the deceased out of the bedroom;

61.10. was the Appellant the man who uttered the final intention to kill the deceased?

62. Fact is, the Court *a quo* was left in the dark in this regard.

63. I am careful not to adopt an over pedantic approach in this regard and to be influenced by any fanciful reservations and fears, but by any analysis, I entertain no doubt whatsoever, that a reliable eyewitness would have been able to spontaneously proffer, at least some detail in this regard. Fact is; there are none.

64. Moreover, in accordance with the authorities referred to herein above, evidence of identification and more specifically that of the single witness had to be tested and this the State failed to do. The defence did so, with a distinct and understandable measure of caution, not to venture where it need not go.

65. My uneasiness does not end with the fact that Petlele was unable to inform the Court *a quo* as to what the Appellant's role was.

66. Petlele testified that he had noticed two of the five men earlier in the day in a 20/20 Golf together with Thulisile who *"… when it drove past she hid herself inside the car and I thought she was hiding herself from the child."*[63]

67. As was the case with the Appellant, the Court *a quo* was not told, in the slightest, what the roles of these two men were during the incident. The two men that he noticed in the 20/20 Golf, were part of the five that took the deceased away.[64]

68. Petlele could, as a matter of fact, decidedly recall that Appellant was not one of the two men that he observed inside the 20/20 Golf.[65]

69. On the whole, I find this total lack of detail paradoxical. I emphasize that I am not critical of the degree of some lack of detail, but the total absence thereof. Petlele, on his version knew or had at least seen three of the five men at some stage before the incident and yet he makes no effort to highlight these men's involvement in any manner.

70. I am not at all suggesting that Petlele ought to have relayed the events which took place during the incident, with the lucid precision expected of a trained story teller, but as a matter of simple logic, sound reason and good judgment, I would have expected of an eyewitness in a situation such as this, to be able to at least, recall to some extent what role the Appellant and

[63] At p22. This is indeed, but one of many red lights which light up, causing one to suspect Thulisile of being involved in the crime. This is significant, as she was not charged and not called as a witness. This has consequences, as I will point out herein below.
[64] At p23.
[65] At p25.

the other two men he had witnessed earlier on in the 20/20, played during the incident.

71. Moreover, Petlele made a statement to the Police the day after the incident[66] and did not inform the Police of the fact that he "knew" one of the five men, in that he had seen him at a braai, on an earlier occasion.

72. This, in addition to what I have described herein above, causes me even more concern.

73. The State argued that Petlele offered a perfectly plausible explanation during cross-examination in this respect, when he responded as follows:

> *"At the time when I made the statement, I was asked about things that happened on that day. I was not asked if I had seen any of these people before or what. That was not put to me."*[67]

74. I am mindful of the fact that Petlele was only fourteen years old at the time when he made the statement to the police, but to my mind, Petlele was sufficiently mature to understand the extreme significance of the fact that he "knew" one of the five men, having seen him before at the braai.

75. After all, merely a year later, when he was only fifteen, the sheer significance of it all then suddenly dawned upon him sufficiently to prompt him to tell the police of this fact, after the identification parade.

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[66] Accepting that the incident took place between 19h00 and 20h00, then the statement to the Police would have been made a few hours after the incident.
[67] At p27.

76. Moreover, it appears to me that Petlele did mention to the police that he had seen the two men in the 20/20 Golf earlier that day, when he made his first statement to the police.

77. That this is undoubtedly so, appears from the following question by counsel representing the State during the trial in the Court *a quo*:

> *"When did you return to the house?*
>
> *Yes, I went there the following day when I went to make a statement to the police.*
>
> *Now to the police. Is there any information that you forwarded to them that you have not testified about today?*
>
> *Yes there is."*[68]

78. Petlele then proceeded to testify about the fact that he noticed the two men in the 20/20 Golf earlier on that day.

79. Petlele therefore did tell the police of the two men, he saw in the 20/20 Golf, when he made his statement the day after the incident. He clearly understood the importance of doing so and it is thus extremely significant that he failed to mention the fact that he knew the Appellant from having seen him at a braai on an earlier occasion.

80. Petlele's explanation during cross-examination, when he was questioned as to why he did not mention this to the police, the day after the incident, is thus very questionable.

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[68] At p21.

81. The following was put to Petlele during cross-examination:

> *"I have gone through your statement, sir, and in the statement there is nowhere where you mention that one of these people that came and took the deceased away, were at the deceased's house at the braai."*[69]

82. To this Petlele responded as follows:

> *"At the time when I made the statement, I was asked about things that happened on that day.* ***I was not asked if I had seen any of these people before or what****. That was not put to me."* (the emphasis is added)[70]

83. However, on Petlele's version, without being prompted or specifically asked in this respect, he did tell the police that he had seen two of the five men earlier on the day in question, in a 20/20 Golf together with Thulisile.

84. It is therefore of much moment that Petlele failed to make any mention of the fact that he knew the Appellant, the day after the incident to the police. I find this incongruous and unacceptable.

85. The chances are in any event remote that Petlele was not asked if he know any of the attackers. That this is so, is evident from the fact that he did mention the two men he witnessed earlier on in the day in the 20/20 Golf, notwithstanding the fact that he, according to him, was not asked any questions if he had seen any of these people before.

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[69] At p27.
[70] At p27.

86. If my conclusions in this respect are justified, then it follows that yet another cloud of suspicion hangs over Petlele's evidence.

87. Significantly Petlele identified the Appellant at an identification parade held on the 14th of July 2006, nearly one year and two months after the incident.

88. Moreover, after identifying the Appellant at the identification parade, Petlele was quick to then tell the Police that he had the occasion to witness the Appellant at a braai held at the deceased's house whilst the deceased was not present, some time before the incident.

89. Petlele did not mention this significant fact to the South African Police one year and two months earlier, and more specifically a few hours after the incident.

90. At the end of Petlele's evidence, after he had testified that he had identified the Appellant at the identification parade, he is simply asked the following question:

> *"And that person,* (referring to the Appellant), *where did you see him before?"*

91. Then Petlele responded as follows:

> *"I saw him at the time when they came to the braai. I saw him again at the time when they came to take my uncle away."*[71]

[71] At p24. This was the high water mark of the evidence of identification of the Appellant, the identity parade aside.

92. In my view, a reliable witness, (and I am not suggesting that Petlele was dishonest), would have spontaneously and unprompted told the Court *a quo,* to some extent at least, what the role of the Appellant was during the incident.

93. A reliable witness in the shoes of Petlele would also have been more specific as to what the roles of the two men were, which he had noticed earlier in the day in the 20/20 Golf together with Thulisile.

94. It does not assist the State to argue that he was not asked any questions relating to the role of the Appellant and/or any of the other four men, when he made his statement to the Police the day after the incident. In fact, it makes it worse. It is a fact, that even if he was not asked questions about whether he had seen any of the men before, (which I very much doubt), Petelele, off his own bat, saw fit to tell the police about the two men he saw earlier in the 20/20 Golf.

95. Not informing the Police of the fact that he had the occasion to witness the Appellant at a braai some time earlier on, in the same breath as spontaneously telling the Police of the two men had seen earlier on in the day of the incident, causes me much doubt.

96. Irrespective of the fact that I have no hesitation in stating that an eyewitness under these circumstances would have spontaneously volunteered some evidence of the role the Appellant played in this regard at least, it was up to the State to

ask these questions, as identification had to be proved and tested.

97. The defence cannot be criticised for not asking these questions. Asking open-ended questions, especially in a criminal matter, where the answer is unknown to the questioner, is bad advocacy.

98. At the end of the day, the State failed to establish what the role of the Appellant was during the incident and in my view, a cloud of suspicion hangs over the identification by the single witness, Petlele.

99. Although there is no evidence surrounding the making of a statement directly after the identification parade, what is clear is that Petlele, after attending the identification parade and after identifying the Appellant, made a second statement to the police in which he then saw fit to mention that he had seen the Appellant on a prior occasion, i.e. at the braai.

100. Regrettably, Petlele was not questioned as to what jolted his memory on the day of the identification parade, i.e. some one year and two months after the incident, to recall that he actually had met the Appellant before at the braai. It would undoubtedly have assisted if this aspect was tested.

101. It warrants specific mention that there seemed to have been general consensus during the debate which took place in the appeal hearing that a finding was justified that the way the

State's case was presented in the Court *a quo* left much to be desired, especially as far as Petlele's evidence is concerned.

102. As a matter of fact, Mr Sellem, who appeared on behalf of the State and who incidentally did not represent the State during the trial in the Court *a quo*, conceded correctly in my view, that the evidence by Petlele was not satisfactory in every material respect by reason of the fact, specifically that he was not questioned as to what role the Appellant played during the incident.

103. It is so that it appeared that the identification parade was properly held, save for some dispute as to whether the investigating officer was present. I see no reason to interfere with the Court *a quo*'s finding that it was not proved that the investigating officer was indeed present during the identification parade and that for all practical purposes the identification parade was properly held.

104. At this identification parade it did not take Petlele long to identify the Appellant.

105. The probative value of this identification must be adjudicated against the backdrop of what I have mentioned hereinabove and this identification, one year and two months later, should not be viewed in isolation.[72]

106. What I find most troublesome is the fact that less than a day after the incident, Petlele did not mention to the police that he

[72] As per the approach by Nugent J.

knew one of the five men, i.e. the Appellant and that he had met him some time before at a braai.

107. Face to face with the Appellant, approximately a year and one month after the incident, Petlele wastes no time in identifying the Appellant as being one of the five men and all of a sudden had this lucid recall, spontaneously or prompted, (that much we do not know), and told the Police that he had met the Appellant before the incident, at a braai at the deceased's house.

108. A very strong possibility exists that the fact that Petlele, (fifteen years at the time), in identifying the Appellant at the identification parade, some one year and two months after the incident in question, may well have been influenced and triggered by the fact that Petlele viewed the Appellant as one of Thulisile's "people", and assumed, that he must have been part of the five men.

109. The following quotation from the evidence of Petlele during cross-examination is significant in this respect and justifies the view I take herein:-

> *"You remember when you started testifying and when you were telling this court about what happened before these people entered the deceased's house. You mentioned that Thuli opened the door. You do not know whether she was opening for these people --- That is what I said, yes.*
>
> *What did you mean by that? --- Yes, the reason I say so is because I saw him (*this is a reference to the Appellant*) at first at the braai. I saw him again when they came to take*

> *the deceased, Tshepang away,* ***hence I say it was her people****."*[73] (The emphasis is added)

110. Even if I could be justifiably criticised for adopting an over cautious approach herein, I am left with doubt.

111. From the photographs of the men who attended the identity parade, it appears that the Appellant, who held the number 9 in front of his chest at the time, sported a moustache.[74]

112. It is raised as a ground of appeal that Petlele never testified as to any identifying features and this is in fact so. During his evidence, the Appellant criticised Petlele for not noticing that his ears were pierced. The Appellant criticised Petlele for not noticing the fact that his ears had been "*open/torn*".[75] It is so that the Court *a quo* responded to this that it too, failed to notice this fact.

113. Petlele was questioned during cross examination about what it was that was peculiar about the Appellant that made him remember him and his response was:

> *"Well, I do not know how to explain this to you, that is why I am saying, I saw him."*[76]

114. If indeed the Appellant wore a moustache either at the braai or the incident as he did at the identification parade, this is an

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[73] At p30.

[74] The photographs of the identity parade was marked Exhibit G1. The photographs of the appellant appear at photos 2, 3, 5 and 6 of Exhibit G1. Exhibit G1 appears at pages 277 up and until 282.

[75] At p142 to 53.

[76] At p32.

aspect which ought to have been addressed by counsel appearing on behalf of the State in the Court *a quo*.

115. It is unclear as to whether the Appellant had a moustache during the trial but such a distinguishing feature, in my view, ought to have been the subject of investigation in the Court *a quo*.

116. A further, and very material problem, as far as the State's case and the evidence of the single witness, Petlele is concerned in this matter, lies in the fact that there was another eyewitness, Thulisile who could have been called to corroborate Petlele's evidence.

117. Thulisile appears as the second witness on the State's list of witnesses[77] and her details are recorded as follows:

"Thulisile Motaung, 27 Deraham Street, Malburton."

118. It is common cause that the State did not call Thulisile to testify, that the State had taken a statement from her, that the defence had a copy thereof and that both parties elected not to call her as a witness.

119. In the matter of R v Bezuidenhout[78] the then Appellate Division dealt with an appeal against a conviction and sentence by appellant on a charge which alleged that the appellant had sold synthetic gems as diamonds.

[77] At p6.
[78] 1954 (3) SA 188 (AD).

120. One of the issues on appeal was whether the Magistrate was correct in drawing a negative inference against the appellant for failing to call a witness which the Crown failed to call and from whom a statement have been taken.

121. The full bench of the Appellant Division was divided as to the result, Van der Heever JA and Centlivres CJ dissenting from the judgment of the majority, Schreiner JA, Greenberg JA and Hoexster JA, who upheld the appeal and set aside the conviction and sentence.

122. Schreiner JA, incisively with respect, had the following to say in respect of the Magistrate's making a negative inference as a result of the failure by the defence to call an available state witness, who was not called by the Crown:

> *"Although the Magistrate mentions it as being merely one factor, it seems to me clear that he found in favour of the Frazers' version of what happened on the 21st January because he inferred that the appellant did not call Petersen for the reason that Petersen would not have supported his case, but would have supported the case for the crown. I can only suppose that the Magistrate lost sight of the evidence that the police had obtained a statement from Petersen. Otherwise I cannot understand his treating the fact that Petersen was not called as operating against the appellant, and indeed, as the very touchstone of credibility as between the Frazers and the appellant.* ***Even in civil cases it has been said to be obvious that where either party could call the witness in question, failure to call him operates rather against the party on whom the onus rests than against the other party*** *(Gleneagles Farm Dairy v Schoombee 1949 (1) SA 830 at 840 (A.D.)).* ***And clearly this reasoning must apply with considerably greater force in a criminal case***

where a crucial inference is sought to be drawn against the accused."[79] (The emphasis is added.)

123. The dissenting minority Judgments did not disagree with this dictum by Schreiner JA and this approach, with respect, must (still) be a correct statement of the legal position in this regard.

124. This approach was followed in S v Teixeira[80]. Although I do not read in the Judgment by Wessels JA, any specific reference to R v Bezuidenhout, I note that it was referred to during argument as is clear from the summary of the submissions on behalf of the Appellant.[81]

125. Wessels JA stated the following:-

> *"In the judgment of the court a quo there is no reference whatsoever to the State's failure to call either Sithole or Tshabalala to testify on behalf of the State, nor to the question whether any inference adverse to the State was justified.* ***Counsel for the State must have realised how unsafe it is to rely on the evidence of a single witness.*** *I will disregard the fact that he failed to call Mr Sithole. In the case of Tshabalala, however, Counsel for the State must surely have realised that, if Sarah's version is to be accepted as truthful, Tshabalala's evidence could have corroborated her evidence in regard to a matter very much in issue – namely the number of incidents. It was clear from Sarah's cross examination that appellant*

[79] Rv Bezuidenhout, *supra* at p196 F to H and p197 A.
[80] 1980 (3) SA 755 [AD].
[81] At p756 G – H.

intended disputing her evidence as to the number of incidents.

It was submitted by Counsel on behalf of the State that an inference adverse to the applicant would equally be drawn from the fact that Tshabalala was not called to testify on behalf of the defence. In this regard, Counsel for the State contended on appeal before this Court that during the trial, Counsel for the appellant indicated that Tshabalala might be called to testify on behalf of the defence and had been furnished with Tshabalala's statement made to the police. This was an ex parte statement made by Counsel acting for the State on appeal. I propose to ignore it, because Counsel who acted for the appellant at the time did not appear before this court and no reference is made thereto in the record of the proceedings. ***In my opinion, the failure by the State to call Tshabalala to testify as a witness, justifies the inference that in Counsel's opinion his evidence might possibly give rise to contradictions which could have reflected adversely on Sarah's credibility and reliability as a witness.***

In my opinion, therefore, the court a quo erred in concluding that the evidence of a single witness, Sarah, were satisfactory in every material respect, and that it was safe to convict appellant of murder on the strength of her uncorroborated evidence, notwithstanding the

improbability inherent in her version."[82] (The emphasis is added.)

126. It is so that the decisions of R v Bezuidenhout and S v Teixeira were decided long before the enactment of our current Constitution.[83]

127. It is by now trite that accused persons have the right to obtain copies of documents and statements in the state's docket.[84]

128. Irrespective of the constitutional right to the contents of the State's docket, it is common cause in the matter before us, that the Appellant's counsel was placed in possession of the statement by Thulisile. It is common cause further that the Appellant's counsel decided not to call Thulisile as a witness for whatever reason.

129. The enactment of our Constitution, does not in my view impact at all on the legal position as set out by Schreiner JA and Wessels JA.

130. The onus in criminal matters has not shifted since the enactment of our Constitution and irrespective of an accused's entitlement to the contents of the docket, a failure by an accused to call a State witness who was not called by the State, after being in possession of the statement by that witness who was not called, does not change the legal position.

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[82] State v Teixeira, *supra* at p763 F – H and 764 A – C.
[83] Act 108 of 1996.
[84] See *inter alia* Tshabalala and others v The Attorney-General of Transvaal and another 1996 (1) SA 725 (CC) at 742 D – 743 B

131. A failure to call a particular witness in a matter, where either party could call the witness, operates against the party on whom the onus rests and in criminal matters that party is the State.[85] This is the legal position in this regard, as pronounced upon by Schreiner JA. I propose to follow it, not only because I am bound to, but because I respectfully agree with it.

132. Where a State witness is available, the police having taken a statement from such a witness and it is obvious that that witness can either corroborate or contradict the evidence of a single witness, then the failure to call such a witness must give rise to a negative inference against the State's case.

133. Moreover, a reading of Petlele's evidence makes it very clear that he suspected Thulisile to be part of the conspiracy to kidnap (and murder) the deceased:

133.1. Petlele testified that Thulisile opened the kitchen door, where after the initial three men entered the house.

133.2. Petlele testified that Thulisile entered the bedroom with her child in the presence of the fourth man who had entered the house.

133.3. Thulisile was not harmed or tied up or assaulted or subjected to any form of abuse.

133.4. Moreover, Petlele testified that he had noticed Thulisile in a 20/20 Golf earlier on the day of the

[85] R v Bezuidenhout, supra, at p196 H.

incident in the presence of two of the men involved in the incident.[86]

134. To my thinking, there exists every reason to suspect Thulisile's possible involvement in the crime. This notwithstanding, the Court *a quo* was not informed as to why Thulisile had not been charged and for whatever reason she was not called as a witness.

135. I find that the State was compelled to do one of two things, to wit:-

135.1. charge Thulisile with the same charges as the Appellant and accused no 2; or

135.2. call her as witness in the trial against the Appellant and accused no 2.

136. The State's failure to do either, must count in the Appellant's favour, as there is thus every indication that Thulisile would not have corroborated Petlele's evidence. If the State charged Thulisile as well, no negative inference could have been made, as I do herein, for the failure to call her as a witness.

137. I am quick to add that it is not necessary, in order to justify a negative inference from the failure to call a State witness who could potentially corroborate the evidence of a single witness, to make a finding that it is evident from the evidence that he/she would not have corroborated the evidence. A negative inference

[86] These are but a few a examples.

is warranted, and indeed called for, on the strength of the approach adopted by Schreiner JA and Wessels JA.

138. I find that a negative inference ought to be drawn from the fact that the State failed to call Thulisile as a witness, who was clearly an eyewitness to everything that Petlele testified about.

139. I also find that no negative inference can be made from the fact that the defence failed to call Thulisile as a witness.

140. On the whole therefore, on the topic of the evidence of the single witness herein, I find that:-

140.1. Petlele's evidence, being a single witness, was not satisfactory in all material respects;[87]

140.2. a negative inference must be drawn from the fact that the State failed to call Thulisile, no 2 on the State list of witnesses, to testify;

140.3. the failure to call Thulisile was a considered one, based upon the obvious realization that she was not going to corroborate Petele's version at all.

Possible corroboration of the evidence by the single witness

141. Dissatisfied with the identification evidence of the single witness, I now turn to investigate whether there was sufficient corroboration in order to accept the evidence by the single witness, Petlele.

[87] This was conceded by the State, during argument.

142. The first is the identification of the Appellant by the single witness at the identification parade. I dealt with this hereinabove, in my discussion of the evidence of Petlele and I need say only this at this juncture.

143. Petele did not tell the police a few hours after the incident, that he had seen one of the men at a braai some time before, importantly, at the deceased's house when the deceased was not present but Thulisile was. Yet he tells the police, unprompted on his version, about the fact that he had seen two of the five men earlier on in the day in question in the 20:20 Golf..

144. Face to face with the Appellant, a year and one month later, he wastes no time in identifying the Appellant and telling the police that he had in fact seen him at the braai, before the incident.

145. This leads to one reasonably possible inference at the very least: Petlele immediately associated the Appellant with Thulisile's"people", remembering the Appellant form the braai and concluded that he must have been part of the five men, who are Thulisile's "people".

146. I am thus still ill-at-ease, even if I take into account this identification.

147. The next possible corroboration lies in the fact that the manner in which the deceased is depicted in the photographs, clearly show that his hands and feet were bound with (hanger) wire.

148. This does corroborate the evidence by Petlele, in that he testified that he saw the deceased in his bedroom with his hands and feet bound with hanger wire. It goes no further than just that.

149. As I have indicated herein above, I do not take into account any of the hearsay evidence which was ruled inadmissible by the Court *a quo*, save to take into account that what happened as a result of the hearsay evidence.

150. This is restricted to the evidence by Jones, who found the firearm at the place where the Appellant and others, including he brother, lived. This firearm was ballistically tested and connected to the firearm used to kill the deceased.[88]

151. According to Jones's evidence, it was accused no 2 who tried to hide the firearm, when he knocked on the door of the dwelling. After entering, he found the firearm where he had witnessed accused no 2 trying to hide it. Accused no 2 was arrested, charged and found guilty on the two charges relating to unlawful possession of an unlicensed firearm and ammunition. He was not identified as one of the five assailants by Petlele.

152. This in my view constitutes the high water mark in respect of possible corroboration, i.e. the fact that the firearm used in the crime was found at the place where the Appellant (and others) lived. There exists a plethora of possibilities as to the reason for the firearm being at the Appellant's place of residence, one of

[88] See the ballistics report at p263 and the lists of admissions at p239 and 241.

which accused no 2 was found guilty of. Speculation is not called for.

153. There is nothing to show any connection between the Appellant and the firearm, save for the fact that it was found where he, (and others), lived; but on the State's evidence, it was accused no 2 who tried to hide it, and who was correctly found guilty of unlawful possession. The Appellant was not present when it was found and his denial of any knowledge thereof cannot be said to be false, beyond reasonable doubt.

Conclusion and final analysis

154. If I step back a pace, after my critical analysis herein above of the individual compartments of the evidence in this case, as I am required to do, and I consider the mosaic as a whole, I cannot make the finding that the Appellant is guilty of murder, when the only possible links are the identification at the identity parade and the circumstantial evidence of the existence of the firearm, at the place where he resided with others.

155. It may be, and on this I do not make any finding, that the disallowed hearsay evidence may have, if allowed, finally tilted the scales in favour of what can be described as sufficient corroboration, but without it, I find that there is nothing sufficiently compelling, which corroborates the unsatisfactory identification evidence of the single witness Petlele, to the extent that it can be said to be true beyond reasonable doubt.

156. In so far as I may have attached too little weight to the scant corroboration that there is, the negative inference I make, against the State for failing to call an available eye witness who could have corroborated the evidence of the single witness, finally causes me to conclude that the State did not prove beyond reasonable doubt that the Appellant was involved in the crimes in question.

157. I have no doubt that the failure for calling Thulisile as a witness was a considered one, based on the firm belief and conviction by counsel of behalf of the State at the time that she would not have corroborated Petlele's version. The State must bear the consequences of this; after all, it could have charged her for the same crimes; that much is clear and which would have eliminated any possible negative inference.

158. Finally, I cannot conclude that the Appellant's denial of any involvement in the crimes is false beyond any reasonable doubt.

159. In the premises I would make the following order:

1. The appeal is upheld.

2. The Appellant's convictions and sentences are hereby set aside.

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LP HALGRYN

Acting Judge of the High Court of South Africa

Counsel for the Appellant: Adv *S.B. Masondo* instructed by Legal Aid

Counsel for the State: Adv *T Sellem*

Date of hearing: 15th March, 2010

Date of judgment: 28th April, 2010